No. 3334.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Thomas H. Gordnier,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

PETITION FOR REHEARING

ROBERT O'CONNOR,
United States Attorney.
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United States Attorney, for Petitioner.

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BRIEF OF DEFENDANT IN ERROR.

To the Honorable Circuit Court of Appeals for the Ninth Circuit:

The opinion of this court in the above case, filed January 5th, 1920, reversed the judgment of the lower court wherein the defendant was convicted for failure to register under the Selective Service Act and remanded the cause for retrial. The defendant in error respectfully petitions that a rehearing be granted.

In this behalf it is respectfully suggested that the importance attached to the decision of this court in this case is because of new ground being broken in Federal jurisprudence, so that it is not a matter of this case alone, but a matter of perhaps hundreds of other cases which may involve some one of the new points that are now being passed upon.

The basis of the court's opinion is that there was no proof of the *corpus delicti* other than certain declarations of the defendant made long prior to the alleged commission of the offense, which declarations therefore are admittedly neither admissions nor confessions. It should be remembered that the *corpus delicti* in the case of failure to register consists of the failure to register and the age of the defendant, which means that in this kind of a case the *corpus delicti* and the guilt of the defendant are inseparable. The failure to register was proven by testimony that the defendant on the registration day lived in a certain precinct and by proper evidence by the local board of that precinct that the defendant was not registered.

This Honorable Court, in its opinion, held that there was no evidence tending to prove that part of the *corpus delicti* relating to age except the *ante litem motam* declarations of the defendant, and that those declarations alone could not prove age.

In so holding, the court breaks new ground in two material respects, first, in holding that *corpus delicti* could not be proven by *ante litem motam* declarations; and, second, by extending to misdemeanors the general rule that in felonies and other high crimes the *corpus delicti* cannot be proven by admissions or confessions standing alone.

Somewhat exhaustive research of the authorities fails to disclose any case in which the exact question of whether the *corpus delicti* may be proven by *ante litem motam* declarations has been considered by a court of record. We did find, however, that the gen-

eral rule as it applies to felonies and high crimes was established in this country to modify and lighten the severity of the rule as enforced in the English courts in the last of the eighteenth and the beginning of the nineteenth century, which was that a conviction might be had upon a confession alone. We further find that the grounds upon which the rule rests are the hasty and unguarded character which confessions often have, the temptation which for one reason or another a party may have to say that which he thinks it most for his interest to say, whether true or false, and the liability which there is to miscontrue or report inaccurately what has been said. But certainly none of those reasons attach to the declarations that we find involved in this case, made at a time long prior to the date of the alleged commission of the offense, in writing and sworn to by the defendant.

The defendant in this case is admittedly either 45 or 46 years old. It may well be presumed that all those having actual knowledge of the date of his birth have passed away. There would seem to be no better proof of his correct age than those declarations of the person himself made from time to time, particularly where those declarations are in writing and have been sworn to by the person himself. Where, as in this case, those sworn written declarations all agree as to the age of the person, and where, as in this case, the person himself when confronted with those declarations in court stands silently by and furnishes no proof of any kind that his age is other than as is declared in those former sworn declarations, although if any one

had it in his power to prove the correct age, it would be he himself, then it seems that there is little reason left for the enforcement of such a rule under such circumstances.

The difference between *ante litem motam* declarations and those made after the controversy has arisen is referred to in the case of Gorham v. Settegast, 98 Southwestern Reporter, page 655, quoting from page 667:

> "That questions of pedigree, such as marriages, births, and deaths of members of a family, may be proved by declarations of the members of the family, which go to make family tradition and history, is an old exception to the rule which, ordinarily, excludes hearsay evidence. This rule rests upon the principle that natural effusions of those who talk over family affairs, when no special reason for bias or passion exists, are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life. To be admissible as evidence, such declarations, however, must have been made *ante litem motam;* for, if made during the course of a controversy, they are regarded as lacking in the ground of trustworthiness."

Rule Stated by This Court as Basis for Its Opinion Not Applicable to Misdemeanors.

Secondly, it should be remembered that the offense of which the defendant was convicted is a misdemeanor. The general rule as to the admissibility of admissions and confessions without other proof of the *corpus delicti* is enforced only in cases of felonies and other

high crimes, so that to extend to admissions and confessions even, would be establishing a new rule, and much more so is the extending of the rule to apply to *ante motam* declarations in cases of misdemeanor.

It will be seen from the study of Federal cases particularly, such as Flower v. U. S., 116 Fed. 241; and Daeche v. U. S., 250 Fed. 566, that the tendency of the courts is to relax the rule, and, indeed, the wording of these two opinions is such as to indicate that if the offenses of which the defendants in those cases had been convicted were misdemeanors, the rule would not have been invoked. In the Daeche case before Circuit Judges Ward and Hough, and District Judge Learned Hand, the court says:

> "That the rule has in fact any substantial necessity in justice, we are much disposed to doubt, and indeed it seems never to have become rooted in England. Wigmore, #2070. But we should not feel at liberty to disregard a principle so commonly accepted, merely because it seems to us that such evils as it corrects could be much more flexibly treated by the judge at trial, and even though we should have the support of the Supreme Court of Massachusetts in an opposite opinion. Com. v. Killion, 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911."

Diligent search has failed to disclose any case in the Federal courts where the rule has been applied to misdemeanors, and with the tendency of the courts against the enforcement of the rule in felonies and high crimes, it would not seem expedient at this late date for the first time to apply it to misdemeanors.

I quote from Commonwealth v. Quick, 15 Pa. District Courts 260, quoting from page 261:

> "The other position taken by counsel for the defendant has considerable more merit in it, and is entitled to much consideration, viz., that a conviction could not be had upon a confession alone; that it should be corroborated by other evidence establishing a *corpus delicti.* An examination of the authorities upon this subject shows that, under the criminal practice of the courts of England, a confession is conclusive without proof *aliunde* of the *corpus delicti:* 3 Russells on Crimes (6th Ed.), 477; Rex v. Tippet, Russ. and R. Y. 509; Rex v. White, Russ. and R. 508; Rex v. Eldridge, Russ. and R. 440. But the practice in the courts of the several states of the United States is to the effect that a confession should be corroborated *aliunde.*
>
> "We have given this matter considerable investigation, and while we find the latter rule to be the one as practiced by the courts of the several states, yet the cases cited related to serious crimes, and we think it not a forced assumption to say that the reason of the rule was dependent to a large extent upon the serious nature of the crime, accompanied by the further reason for the holding of the rule, and that is, the effort of the several courts to modify and lighten the severity as practiced in the English courts in the last of the eighteenth and the beginning of the nineteenth century relative to the trial and punishment of alleged crime. The reason for the rule no longer existing, the rule itself should cease, and we are of the opinion that there is no reason for any such rule in the practice of the courts in the trial of

misdemeanors and violations of law, which may be classed as police regulations, and especially so when there is added to this that a confession is the very best evidence that can be obtained under all the circumstances.

"Here is a case in which the minor was a delinquent. If called upon to testify in court she would have been confronted with the fact that her own testimony would convict her of an infraction of the order of the court relative to her conduct, and she could easily have refused to testify. There is nothing in the evidence that any persuasive influences were used upon the defendant, nor that his confession was in any sense other than voluntary. He at once admitted the truth of the charge, and gave in detail the acts constituting the offense as charged. Without any other evidence whatsoever we are of opinion that this was sufficient to sustain a conviction of a violation of the law. The only case which we have been able to find which sustains this position is that of State v. Gilbert, 36 Vermont 145, viz.:

" 'The rule laid down in some books that there can be no conviction of crime upon confessions alone without other proof of the *corpus delicti* is held not applicable to the lower grade of crimes, as to the offense of selling liquor in violation of the statute.'

"The commonwealth established by the evidence the existence of Ada Ike, that she was a minor child between the ages of fourteen and fifteen years, the arrest of the defendant, his appearance before the magistrate, and his admission of the truth of the charges as made. and a statement upon his part of how the alleged misdemeanor was committed. To sustain a conviction under this

evidence would establish no precedent that could in any way affect the rule as laid down relative to confessions in trials for crimes of serious nature, and it is our opinion that such confession should be sufficient to sustain the conviction without other proof of the *corpus delicti,* and we so hold."

Also from Supreme Court of Vermont, in State v. Gilbert, 36 Vermont Reports, page 148:

"It is claimed on the part of the respondent that confessions alone are not sufficient in law to warrant a conviction. It is true that it is said in some of the books that the accused should not be convicted upon confessions without some other evidence tending to show that the crime has been committed, or as it is said, unless there is other proof of the *corpus delicti;* that is, in case of murder, that the person alleged to have been murdered is deceased, or in case of larceny, that the property alleged to have been stolen has been taken or lost. This however is said usually in reference to high crimes. Whether this is an absolute rule of law, or a precautionary rule merely to be observed by jurors or the triers of fact in weighing the evidence, it is unnecessary to decide. If it is a rule of law applicable to felonies and the higher crimes, we think there is no such absolute rule of law applicable to the lower grades of crime or misdemeanors to which this offense belongs; although great caution should always be exercised in weighing evidence when it consists of confessions alone. This objection to the character or sufficiency of the evidence cannot prevail. Thus far we find no error."

There Was Sufficient Evidence Aliunde to Justify Admission Ante Litem Motam Declarations of Defendant.

Without regard to the foregoing conclusions, it is respectfully suggested that perhaps the court in arriving at its conclusion that there was no proof of age other than the declarations of the defendant, has overlooked the fact that there was some evidence of the *corpus delicti* in so far as age is concerned other than the declarations of the defendant. It is conceded that slight evidence of the *corpus delicti* would make admissible the declarations of the defendant and that then if the slight evidence together with the declarations of the defendant, convinced the jury beyond a reasonable doubt, conviction is proper, and the verdict of the jury will not be disturbed on appeal.

The evidence of age other than the affidavits of the defendant was the presence of the defendant before the jury, and the unquestioned right of the jury to observe the defendant, and consider the results of that observation in arriving at his age.

As stated by Jones on Evidence, section 401, page 506:

> "But the jury may, when age is an issue, take into consideration the appearance of the defendant as seen in court."

Citing:

Jones v. Jones, 106 Ga. 365;
Com. v. Holles, 170 Mass. 433;
State v. Thompson, 55 S. W. 1013;
Hermann v. State, 73 Wis. 248.

> "There is, however, authority for the proposition that the jury may, without any other evidence than mere inspection, determine whether a person to whom liquor has been sold is a minor, or whether a person is of sufficient age to perform the work given him to do."
>
> Com. v. Emmons, 98 Mass. 6.

In the case of Commonwealth v. Emmons, 98 Massachusetts 6, the defendant was charged with keeping a billiard room and admitting thereto minors without the consent of their parents. Upon the trial, one of the alleged minors was called as a witness, but the defendant objected to his testifying to his own age, and the court permitted the jury to determine by personal inspection whether or not the witness was a minor. *No other evidence of age was offered.* In this case age was as much a part of the *corpus delicti* as in the instant case, and yet the Supreme Court of Massachusetts says:

> "There is nothing in the bill of exceptions from which it can be inferred that the defendant was aggrieved by the ruling of the court in permitting the jury to judge whether one of the alleged minors was under age from his appearance on the stand. There are cases where such an inspection would be satisfactory evidence of the fact. It certainly was not incompetent for the jury to take his appearance into consideration in passing upon the question of his age, and it does not appear that this may not have afforded plenary evidence of the fact, the defendant fails to show that he was convicted on insufficient evidence or that he has been prejudiced by the ruling of the court."

So in Commonwealth v. Hollis, 170 Mass., page 433, where the defendant was charged with having carnal knowledge of a female under the age of 16 years. Through inadvertence, or for some reason, the girl was not asked her age, and there was no proof of age, yet the Supreme Court sustained the conviction because it was not incompetent for the jury to consider her appearance in determining her age. It may have been quite obvious that she was under sixteen."

The rule is well stated in the Modern Law Evidence, Chamberlain, Vol. 3, section 2045 and 2048:

> "Where a person whose age is in question is present in court or an inanimate object is submitted to the inspection of the jury, the latter will be permitted to draw the necessary inference for themselves, unassisted by witnesses, ordinary or skilled."

Nor does the fact that the defendant in this case failed to take the stand differentiate from the cases in support of the above rule, nor could it be said to contravene the fifth amendment by compelling the defendant to become a witness against himself.

See Holt v. U. S., 218 U. S. 245, where on page 252, the Supreme Court says: :

> "Another objection is based upon an extravagant extension of the fifth amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be ex-

> cluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams v. New York, 192 U. S. 585."

Therefore, when considered in the light of the cases of Flower v. United States, 116 Fed. 241; Dadche v. U. S., 250 Fed. 566; U. S. v. Williams, 28 Fed. Cases, 16,707; Naftzger v. U. S., 200 Fed., p. 494; Commonwealth v. Killion, 194 Mass. 153; People v. Badgley, 16 Wend. (N. Y.) 53; and People v. Jones, 123 Cal. 65; it will be seen that the rule generally followed is that the evidence *aliunde* of the *corpus delicti* may be very slight to make admissible declarations—or even confessions—and to justify a verdict if the jury believes the *corpus delicti* has been proven beyond a reasonable doubt by the slight evidence *aliunde* plus the declarations of the defendant.

The Circuit Court of the Second Circuit in the Dadche case above, page 571, speaking of the circumstances *aliunde*, which are required to be proven before the admissibility of the defendant's confessions, says:

"Independently they need not establish the truth of the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of truth."

And the Circuit Court of Appeals for the Fifth Circuit in Flower v. U. S., 116 Fed., reading from page 247, says: :

"The rule so strenuously urged on behalf of the plaintiff in error had its origin at a time when many offenses were punished capitally, and was first applied in cases where the offense charged was murder or other capitally punished felonious homicide, and was so established as a necessary caution against inflicting the last extreme of punishment upon one accused of a crime which had never been committed; and it took its first form in the expression that 'the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body,' on which Mr. Starkie remarks that it is a rule warranted by melancholy experience of the conviction and execution of supposed offenders with the murder of persons who survived their alleged murders. Mr. Bishop says:

" 'This doctrine, requiring a special directness and clearness of the evidence to the fact of there having been a crime, was extended to larcenies from unknown persons, and to some and possibly all other indictable delinquencies. But the doctrine, at least in later times, has been regarded rather of caution than of absolute law.' Bish. Cr. Proc. #1056.

"Judge Samuel Nelson, then chief justice of the Supreme Court of Judicature of New York, in delivering the opinion of the court in the case

> of People v. Badgley (October term, 1836) announced the doctrine on this subject to be 'that full proof of the body of the crime,—the *corpus delicti*,—independently of the confession, is not required by any of the cases, and in many of them slight corroborating facts were held sufficient.' The offense involved in that case was that of forgery. 16 Wend. 53. More than 20 years later this doctrine was largely discussed by Mr. Justice Clifford in U. S. v. Williams, in which the defendants were charged by indictment with murder on the high seas, and the conclusion reached that 'all that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confession; and where such evidence is introduced it belongs to the jury, under the instructions of the court, to determine upon its sufficiency.' 1 Cliff. pp. 5-28, Fed. Cas. No. 16,707."

So far as the transcript in this case indicates, the defendant in appearance may have been nearer 35 than 45, in which event certainly the jury would be justified in assuming that the defendant was right in his several sworn, written declarations, which would make him 45, as claimed by the government, instead of some age beyond that, as doubtless claimed by the defendant, although the defendant did not take the witness stand nor produce any evidence whatever, so that we know not what his intentions in that regard really are.

Remembering that the offence is a misdemeanor, it would seem that the foregoing authorities would make

such inspection by the jury some evidence of *corpus delicti,* in so far as age is concerned, which would make admissible at least *ante litem motam* declarations.

It will be noted that the matters referred to in this petition were not called to the attention of this court either in the briefs or upon oral argument, and it is impossible and perhaps not expected to fully cover them in this application, but it is respectfully suggested that they are of sufficient importance to justify the granting of a rehearing, so that they might be fairly presented to this Honorable Court by both sides, to the end that when the decision is finally rendered and reported, it will not be open to subsequent attack when used in later cases that these points were not presented to the court and decided by it.

ROBERT O'CONNOR,
United States Attorney.

I, Robert O'Connor, United States Attorney for the Southern District of California, and one of the attorneys for the petitioner, the United States of America, in the foregoing petition for rehearing, do hereby certify that in my judgment this petition is well founded and that it is not interposed for delay.

ROBERT O'CONNOR,
United States Attorney, for Petitioner.